

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-279

ROBERT RANDOLPH TUOHEY
APPELLANT

V.

BRENDA KAY TUOHEY
APPELLEE

Opinion Delivered NOVEMBER 5, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. DR-2007-2063]

HONORABLE MACKIE PIERCE,
JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Robert Tuohey appeals from the November 6, 2007 and January 22, 2008 orders of the Pulaski County Circuit Court. On appeal, he argues that the circuit court's award of spousal support, as well as the distribution of the marital home and marital debt, were inequitable. Additionally, appellant argues that the circuit court erred in failing to issue findings of fact and conclusions of law in support of its rulings. We affirm with respect to the award of spousal support and the distribution of marital assets and debt; however, we are unable to reach appellant's second issue because he failed to file a timely notice of appeal.

The parties were married on August 6, 1994. One child was born of the marriage, E.C.T., D/O/B October 22, 1999. The parties separated on November 11, 2005, and on April 26, 2007, appellee Brenda Tuohey filed for divorce on grounds of general indignities. Appellant answered the complaint on May 4, 2007.

A hearing on the petition for divorce was held on October 9, 2007, at which time the circuit court ruled in favor of appellee based upon grounds of eighteen months' separation without cohabitation pursuant to Arkansas Code Annotated section 9-12-301. Appellant filed a post-hearing motion for modification of ruling and a motion for findings of fact in support of those rulings on October 29, 2007, in which he attempted to demonstrate the inequitable discrepancy between the parties' incomes that resulted from the circuit court's award of support and distribution of marital debt. The actual divorce decree was filed on November 6, 2007, pursuant to which appellant was required to pay spousal support in the amount of \$900 per month for forty-eight months, was responsible for payments on the second mortgage on the marital home in the amount of \$600 per month until the debt of approximately \$34,212 is satisfied, as well as pay for one-half of any repairs or maintenance to the marital home that exceed \$250. Also, as part of the divorce decree, appellee was granted possession of the marital home, which was to be sold upon agreement by the parties, but no later than such time as the parties' minor child reaches majority or graduates from high school, whichever occurs later.

Appellee filed a response to appellant's post-hearing motions on November 13, 2007, and appellant filed a notice of appeal from the divorce decree on December 4, 2007. Appellant was unable to obtain a hearing on his motions until January 9, 2008, and subsequently, on January 22, 2008, the circuit court entered an order denying appellant's motions. Appellant filed a second notice of appeal, attempting to consolidate it with his original notice of appeal, on February 22, 2008. He sought in this second notice of appeal

to challenge (1) the amount of child support awarded,¹ (2) the distribution of marital assets, specifically the marital residence, (3) the amount awarded for spousal support, and (4) the failure of the circuit court to make specific findings of fact and conclusions of law when requested by him prior to the entry of the divorce decree.

Procedural Issues

The initial notice of appeal was filed on December 4, 2007, and related to the divorce decree filed on November 6, 2007. The notice of appeal addressed (1) the amount of child support awarded (*later abandoned*), (2) the distribution of marital assets, specifically the sale of the marital residence, (3) the amount awarded for spousal support, and (4) the failure to make specific findings when requested by appellant prior to the entry of the divorce decree. The original notice of appeal properly covers the first three issues, but not the final issue because the circuit court had not yet ruled on appellant's post-hearing motions at the time the notice of appeal was filed, and the date that they would be deemed denied had not yet occurred.

Appellee asserts that appellant's post-hearing motions are essentially a motion for reconsideration/motion for new trial pursuant to Rule 59(a)(6) of the Arkansas Rules of Civil Procedure and a motion for findings and/or to amend findings pursuant to Rule 52 of the Arkansas Rules of Civil Procedure. Given that the relief requested fell within the parameters of Rules 52 and 59, appellant was required to seek a ruling within thirty days of the date on which the motion was filed or treated as filed. *See* Ark. R. Civ. P. 52(b)(1). In this case, the motions were treated as filed on November 7, 2007, the day after the divorce decree was

¹Appellant is not challenging the child-support award in this appeal.

entered on November 6, 2007. *See* Ark. R. Civ. P. 52(b)(1). Because no action was taken by the circuit court within thirty days of filing, the post-hearing motions were deemed denied on December 7, 2007. At that time, the circuit court ceased to have jurisdiction to further act on those motions.

Appellant, however, scheduled a hearing on the motions for January 9, 2008, which he claims was the earliest date possible for the circuit court and the parties' attorneys. Initially, we note that neither a congested docket nor busy schedules of attorneys relieved appellant's counsel of the duty to file a timely notice of appeal based upon the date that the motions would have been deemed denied. Appellee contends that when the parties appeared on January 9, 2008, appellant had already missed the window of time in which to seek a ruling from the court. At that point, the circuit court had no authority to act because the post-hearing motions had been deemed denied by operation of the applicable rules of civil procedure. If appellant's motions are treated as either Rule 52(b) or 59(a) motions, the second notice of appeal filed by appellant on February 22, 2008, was not timely since the post-hearing motions were deemed denied on December 7, 2007. *See* Ark. R. App. P. – Civ. 4(b).

Alternatively, even if viewed from the date that the actual order denying appellant's post-hearing motions was filed, January 22, 2008, appellant filed the second notice of appeal one day too late. Upon review, the thirtieth day would have been Thursday, February 21, 2008, but the notice was not filed until Friday, February 22, 2008. Although Monday,

February 18, 2008, was a holiday, Martin Luther King Day, the deadline did not fall on the holiday; accordingly, appellant does not benefit from an extra day.

Because the circuit court had not ruled on appellant's post-trial motions as of the date of the filing of the initial notice of appeal on December 4, 2007, that initial notice of appeal does not apply to the order filed on January 22, 2008. Additionally, the second notice of appeal that specifically does apply to the January 22, 2008 order was not timely filed. Accordingly, we do not reach the merits of appellant's argument that the circuit court erred in failing to make specific findings of fact and conclusions of law as requested by him.

A. Unequal Distribution of Marital Assets and Debts

(1) Standard of Review

Domestic-relations cases are reviewed de novo on the record; however, this court does not reverse findings of fact by the circuit court unless the findings are clearly erroneous. *Taylor v. Taylor*, 369 Ark. 31, 250 S.W.3d 232 (2007) (citing *Farrell v. Farrell*, 365 Ark. 465, 231 S.W.3d 619 (2006)). This standard applies for the division of property itself. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.* In order to demonstrate that the circuit court's ruling was erroneous, the appellant must show that the circuit court abused its discretion by making a decision that was arbitrary or groundless. *Id.*

At the time a divorce decree is entered, all marital property is to be distributed one-half to each party unless the court finds such division to be inequitable. Ark. Code Ann. §

9-12-315; *Miller v. Miller*, 70 Ark. App. 64, 14 S.W.3d 903 (2000). When assessing the value of property, the court should consider the value of the property at the time the divorce decree is entered. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). If the court finds that one party should receive more than one-half of the marital property, the basis for such a decision must be recited in the final divorce decree. Ark. Code Ann. § 9-12-315(a)(1)(B).

The trial judge has authority to consider the allocation of debt in a divorce case. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003). In fact, an allocation of the parties' debt is an essential item to be resolved in a divorce dispute. *Id.* It must be considered in the context of the distribution of all of the parties' property. *Id.* A judge's decision to allocate debt to a particular party or in a particular manner is a question of fact and will not be reversed on appeal unless clearly erroneous. *Id.* When considering the allocation of debt, it is also appropriate that the judge consider who should equitably be required to pay it. *See id.*

(2) *Discussion*

Appellant argues that, when viewed as whole, the award of the marital home to appellee versus his obligations regarding spousal support, one-half the cost of repairs and maintenance to the marital home, and his responsibility for the repayment of the second mortgage thereon, results in an inequitable division of the marital property and creates an inequitable burden on him. Each sub-issue will be discussed individually.

(a) *Spousal support*

Appellant points out that the circuit court prefaced its award of spousal support to appellee, \$900 monthly for forty-eight months, by stating that a disparity between the parties' incomes exists and that appellant earns the greater amount of money. He asserts that, when the amount of total support awarded to appellee is considered, the disparity has shifted too far in favor of appellee. He cites *Mitchell v. Mitchell*, 61 Ark. App. 88, 964 S.W.2d 411 (1998), for the proposition that alimony should be reasonable under the given circumstances. Appellant points out that when broken down by percentage, appellee will receive forty-four point sixty-two percent (44.62%) of his net income during the first seven months following the entry of the decree. For the forty-one months following, appellee will receive thirty-eight point seventy-four percent (38.74%) of his income, and for the final months twenty-three point ninety-two percent (23.92%).

He also cites *Hackett v. Hackett*, 278 Ark. 82, 643 S.W.2d 560 (1982), in which our supreme court held that the circuit court is obligated to consider the marital debts in deciding spousal support and division of property. He was shouldered with a much larger share of the marital debts, especially the obligation of the second mortgage on the marital home. He maintains that the combined award of debt, child support, and spousal support is inequitable and that the circuit court's order overcompensates for any disparity in the parties' incomes.

Appellee clarifies the disparity in incomes relied upon by the circuit court at the time of the award, specifically, that she earns roughly one quarter the amount earned by appellant. The circuit court cited as its primary consideration appellee's need and appellant's ability to

pay. She cites *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993), for the proposition that the need versus ability has long been the primary factor in considering an award of spousal support. While such an award is not mandatory, it is an issue that is left to the discretion of the circuit court, and we do not disturb that decision absent a clear abuse of that discretion. See *Hiatt v. Hiatt*, 86 Ark. App. 31, 158 S.W.3d 720 (2004).

Appellee acknowledges that the circuit court considered the parties' testimony, trial exhibits, respective affidavits of financial means, and other relevant factors on the issue. She details the parties' educational and work histories, salaries, and appellant's disability payments, including the fact that she worked to help put appellant through school for his degree in registered nursing. Appellee points out that the monthly award of \$900 represents fourteen point eighty-three percent (14.83%) of appellant's net monthly income for 2007. When combined with the child-support obligation, appellant was actually required to pay thirty-four point three percent (34.3%) of his monthly income for true "support" payments in the first seven months following the divorce decree, and only twenty-eight point eighty-five percent (28.85%) starting in month eight. She contends that it is misleading for him to add the second mortgage payment into that figure because the circuit court never referred to that as "support."

Additionally, appellee claims that appellant's calculations fail to consider the favorable tax treatment he receives for his spousal-support payments. As an "above the line" tax deduction, he is entitled to a deduction of \$10,800 per year, while she must pay ordinary income taxes at her applicable tax rate for all the payments she receives. She maintains that

appellant's percentages are considerably overstated when taking into account that the second-mortgage payment should not be considered a "support" payment and the actual spousal-support payments are tax deductible. Appellant responds that appellee is off by one-hundredth of a percentage point in her calculation and urges the court not to consider her argument regarding tax relief because no evidence of such was presented in this matter before appellee included it in her appeal.

Appellant filed a response brief in which he asks the court to take note of the secondary factors that may be considered when determining an award of spousal support including the disposition of the homestead, the extent and nature of the resources and assets of each party, and the amount of child support awarded. He maintains that regarding the debt on the marital home, the court should have considered that appellee's first mortgage will cease when the home is sold at some future date; however, his will continue until the debt is paid in full. Therefore, he will not receive relief from the second-mortgage debt, while appellee will be free of her obligation, with equity in hand.

With respect to education and employment, appellant argues that things are not as clear as appellee makes them out to be. He maintains that her version of events overlooks the fact that he continued to work during the pursuit of his registered-nurse degree. He claims that it was appellee's *choice* not to further her education during the marriage, not simply that she had to work full time and care for the children at night. He contends that they discussed the possibilities, that he encouraged her to attend college, and that he even looked for

opportunities for her to do so. He contends that appellee simply did not want to go back to school because of a bad experience she had at a business college in the past.

Based upon the evidence before us, we hold that the circuit court was not clearly erroneous in its award of spousal support. Accordingly, we affirm with respect to this issue.

(b) Division of marital assets and liabilities

Appellee was granted exclusive use and possession of the marital home, with the sale of the home potentially not taking place until much later, as much as nine years after the divorce became final when the minor child either reaches the age of eighteen or graduates from high school.² Appellee was ordered to pay the first mortgage on the home, currently \$1,004 per month, as well as all utilities associated with the home.

Appellant was ordered to pay the second mortgage on the home, which is currently \$600 per month. Appellant asserts that the circuit court's order, in effect, delays the division and final distribution of marital property for up to ten years and yet requires him to be responsible for the second mortgage and a significant portion of the repairs and maintenance on the home. He reiterates the inequity of the situation, especially in light of the fact that he alone paid the mortgages and all other bills during the marriage. Appellant contends that the order punishes him by keeping the primary marital asset — the equity in the home —

²The actual language of the decree provides that the residence may be sold at any time by agreement between the parties, but in any event, the residence will be sold no later than the minor child's eighteenth birthday or graduation from high school, whichever occurs later.

undivided until such time as appellee agrees to sell the home or the minor child reaches eighteen or graduates.

While appellant acknowledges that Arkansas Code Annotated section 9-12-315 does not compel mathematical precision in the distribution of property, he contends that it does require that marital property be distributed equitably. *See Copeland v. Copeland*, 84 Ark. App. 303, 139 S.W.3d 145 (2003). Alternatively, he points out that the statute requires that the basis and reasons for an inequitable division be stated in the order, and no such reasons were included in the order of the circuit court. Additionally, the circuit court declined to issue such reasons subsequent to the entry of the order despite appellant's written motion requesting such findings and conclusions.

Appellee claims that appellant is incorrectly applying Arkansas Code Annotated section 9-12-315 in claiming that the circuit court should have ordered the marital home to be sold at the time of the divorce. She cites *Banks v. Evans*, 347 Ark. 383, 64 S.W.3d 746 (2002), and *Hale v. Hale*, 307 Ark. 546, 822 S.W.2d 836 (1992), for the proposition that the statutory provision is inapplicable to real property held as tenants by the entirety and claims there is no dispute that the marital residence was so held. She cites, as the applicable statute, Arkansas Code Annotated section 9-12-317, which states in part:

a) Hereafter, when any circuit court in this state renders a final decree of divorce, any estate by the entirety or survivorship in real or personal property held by the parties to the divorce shall be automatically dissolved *unless the court order specifically provides otherwise*, and in the division and partition of the property, the parties shall be treated as tenants in common.

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(c) . . . the court may distribute the property as provided in § 9-12-315. The court shall set forth its reasons in writing in the decree for making an other than equal distribution to each party, when all the property is considered together, taking into account the factors enumerated in § 9-12-315(a)(1).

(Emphasis added.)

The circuit court had two options with respect to the property, place one party in possession or order it sold. Appellee claims that the ruling was not inequitable, in that, once the home is sold, appellant will receive half of the sale proceeds. He is responsible for the second-mortgage debt on the residence, but he will also directly benefit from the payments she makes on the first mortgage because the principal balance will be reduced and the equity will increase. She is responsible for any and all repairs and maintenance that cost less than \$250, and he will benefit from those larger repair and maintenance costs he is required to split because the condition of the home will undoubtedly affect its marketability at such time as it is sold. She maintains that the circuit court's ruling was not contrary to Arkansas statutes and case law, and in fact, was not an unequal distribution.

Appellant responds that appellee failed to recognize that, while he will receive one-half of the sale proceeds when the home is sold, his share of the proceeds are unlikely to be large enough to pay off the second mortgage on the residence. He asserts that she will receive her share of the proceeds free and clear of the first mortgage, but he will continue to maintain a large liability.

The circuit court ordered appellee to pay the debts listed in her name only on her affidavit of financial means, as well as the first mortgage on the marital residence. The

mortgage payment is approximately \$1,004 per month, and her other miscellaneous debts of \$12,589.81 require monthly payments of \$590. Appellant was ordered to pay the debts listed in his name only on his affidavit of financial means, as well as the second mortgage on the marital residence, which amounts to \$600 per month.

Appellant reiterates that the circuit court held him solely responsible for the payment of the second mortgage on the marital home regardless of when that residence might be sold. He is not allowed to satisfy the mortgage out of the equity realized from the sale of the home, which he maintains contradicts the contractual language of the mortgage agreement requiring both parties to be responsible for the debt and provides for the payment from the proceeds of the sale of the house. Appellant contends the circuit court's oral ruling, and the divorce decree itself, fail to give a clear indication of how long he is to be "on the hook" for the debt, and do not clearly indicate whether his payoff of the second mortgage will reduce appellee's portion of the sale proceeds.

While appellee is responsible for the payment of the first mortgage on the residence, she is allowed to satisfy the debt from the proceeds on the sale of the home, with the equity ordinarily then split with appellant. However, appellant maintains that the circuit court has basically created a new unsecured debt that requires him to pay appellee the unpaid balance of the second mortgage at the time of the sale.

Appellee testified that she was unaware of how appellant had used the money from the second mortgage, although he explained that he used it to satisfy the family's monthly bills and living expenses after his employment changed. Appellant further contends that both

parties benefitted from the second mortgage, but asserts that appellee's testimony regarding the second mortgage confused the issue. Appellant argues that the circuit court has failed to provide findings of fact or conclusions of law to support or justify this component of its order, and that as it stands, the ruling that he alone must incur the debt of the second mortgage is inequitable without explanation. He claims the same is true with respect to the ruling requiring him to split the cost of maintenance and repairs on the property that exceed \$250. He reiterates that the circuit court's ruling makes him responsible for these expenses on a home he does not live in for up to ten years and, in effect, makes it impossible for him to purchase another home until such time as the marital residence is sold.

Appellee maintains that the circuit court did not err in requiring appellant to pay the second mortgage, given his greater level of income and superior ability to pay the debt. She further points out that appellant testified that he may not have told her about all of the draws he took on that credit line and did not recall much specific information about how he spent the money some seven years prior to trial. Appellant also acknowledged gambling in the past, but claimed he had not done so in the four years leading up to the hearing. Additionally, appellant acknowledged giving his father several thousand dollars that he had drawn from the credit line. Appellee contends that appellant incurred "the lion's share" of this debt and offered little or no explanation as to where the funds were spent. She maintains that the circuit court properly considered all relevant testimony and evidence and came up with a decision to order appellant to pay the second mortgage, which is a decision appellee contends was equitable in nature.

Appellant vehemently denies her characterization of this testimony and points out that he gave appellee \$250 - \$300 each week from the credit line to pay for items such as food, toiletries, and dining. He points to her testimony that she knew he was paying off legitimate debt with the money. He asserts that there is no clear evidence to support her allegations.

There is evidence before us that supports the circuit court's finding that appellant should be responsible for the repayment of the second mortgage on the marital home. Whether it creates an inequitable division of the primary asset is difficult to ascertain because of the lack of specific reasons supporting the findings in the divorce decree. However, we are unable to reverse and remand for the issuance of additional findings on this issue because appellant failed to file a timely notice of appeal with respect to the order denying his motions. Additionally, we hold that the circuit court was not clearly erroneous with respect to the other issues related to the marital home including the award of exclusive use and possession, the responsibility for utilities and the first mortgage, and the division of major repair and maintenance costs.

Affirmed.

VAUGHT and HUNT, JJ., agree.